# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~350.~~ 123

CHARLES STOTT, WILLIAM McLEAN, WILLIAM L. WALLER, JAMES P. TUSTIN, FREDERICK TSCHIFFELY, AND JOHN A. McCALLA, PLAINTIFFS IN ERROR,

vs.

WILLIAM RUTHERFORD.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 8, 1873.

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## No. 350.

CHARLES STOTT, WILLIAM McLEAN, WILLIAM L. WALLER, JAMES P. TUSTIN, FREDERICK TSCHIFFELY, AND JOHN A. McCALLA, PLAINTIFFS IN ERROR,

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2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Charles Stott, William McLean, William L. Waller, James P. Tustin, Frederick Tschiffely, and John A. McCalla, plaintiffs, and William Rutherford, defendant, No. 7122 at law, a manifest error hath happened, to the great damage of the said as by complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this 30th day of September, in the year of our Lord 1873, and of the Independence of the United States the 97th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

TO WILLIAM RUTHERFORD:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Charles Stott, William McLean, William L. Waller, James P. Tustin, Frederick Tschiffely, and John A. McCalla are *is* plaintiff', and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, David K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Chf. Just.*

(Indorsed:) 7122. At law. State vs. Rutherford. Writ of error. Issued Sept. 30, '73. No bond on file.

3 CHARLES STOTT ET AL. *vs.* WILLIAM RUTHERFORD. } No. 7122, at law.

DISTRICT OF COLUMBIA, *ss:*

The answer of the chief-justice and the justices of the supreme court of the District of Columbia to the foregoing writ of error is in the words following, to wit:

4 *Amended declaration.*

In the supreme court of the District of Columbia.

| | | |
|---|---|---|
| CHARLES STOTT, WILLIAM MCLEAN, WILLIAM L. Waller, James P. Tustin, Frederick A. Tschiffely, and John M. McCalla, pltfs., *agt.* WILLIAM RUTHERFORD. | At law. | No. 7122. |

The said plaintiffs, by William A. Meloy, their attorney, come into court and sue the said defendant, for that whereas, heretofore, and on or about the 15th day of February, 1864, to wit, in said District of Columbia, by a certain indenture or instrument in writing under seal, then and there duly made, executed, and delivered, by and between one P. D. Gurley (since deceased) and the said plaintiffs, Charles Stott, William McLean, William L. Waller, James P. Tustin, Frederick A. Tschiffely, and John M. McCalla, parties of the first part, and the said de-
5 fendant, William Rutherford, of the second part, the said parties of the first part, for the consideration in said instrument set forth, demised and leased unto the said defendant certain premises described in said instrument, viz, lot four and part of lot three, in square numbered four hundred and forty-six, on the plan of the city of Washington, in said District of Columbia, together with all and singular the rights, privileges, and appurtenances thereunto belonging, especially an unfinished brick building on the northern end thereof, to hold the same to the said defendant, his executors, administrators, and assigns, from the first day of Feb'y, 1864, for a term which ended on the first day of Oct., 1869, receiving therefor the annual rental of five hundred dol-
6 lars, payable semi-annually, on the first day of August and the first day of Feb'y, during the continuance of said term by said defendant, to the said parties of the first part, their successors or assigns; and the said defendant, for himself, his executors, administrators, and assigns, thereby also covenanted, promised, and agreed, to and with the said parties of the first part, their successors and assigns, that he, his executors, administrators, and assigns, (among other things,) should and would pay the rent aforesaid, as the same or any part thereof should become due, according to the intent and meaning of said instrument; that he and they should and would pay all taxes and assessments that might be levied or imposed upon said premises by the corporation of Washington, or by the United States; that he would, without delay, proceed to place the unfinished brick building aforesaid
7 in a condition of safety from damage, by raising the walls thereof to a level with the wall on the north side thereof, in all respects in style of work, material, and thickness of walls, as the same were at the date of said instrument, and would cover the said building with a substantial roof, keep the same in order during the said term, and deliver up the same in good condition at the termination thereof, the necessary wear and natural decay in the use thereof alone excepted; (one part of which indenture, or instrument in writing, sealed with the seal of said defendant, the said plaintiffs now bring here into court, the date whereof is the day and year first aforesaid;) by virtue of which said indenture, the said defendant immediately thereupon entered into the occupancy and enjoyment of said premises and appurtenances, and became
8 and was possessed thereof, until on or about the first day of Oct., 1869, when he vacated such possession and occupancy, and the

term of said lease was determined; and although the parties of the first part, their successors and assigns, have always from the time of making said instrument hitherto, done, performed, and fulfilled all things therein on their part to be done, performed, and fulfilled, yet the said defendant did not, during the continuance of said term, nor hath at any time, kept or performed the aforesaid several covenants on his part, in this:

That he hath not paid the installments of rent which became due on the 1st day of Feb'y, 1869, and on the first day of Aug., 1869, and the proportionate amount accrued and which became due on the first day of Oct., 1869, either or any part of the same.

That although the corporation of Washington, at various times during the term aforesaid, levied and imposed sundry taxes and assess-
9 ments upon said premises, amounting in all to about the sum of twelve hundred dollars, nevertheless the said defendant, though requested to pay the same, hath hitherto neglected and refused to pay any part thereof, by reason of which neglect and refusal the said taxes and assessments became and were, at and subsequent to the termination of the lease aforesaid, an incumbrance upon said premises.

That the said defendant hath not placed the aforesaid brick building in a condition of safety from damage, by raising the walls thereof to a level with the wall on the north side thereof, in all respects in style of work, materials, and thickness of walls as they were at the date of said instrument.

Nor hath he kept the said building in order during said term, or
10 delivered up the same in good condition, the necessary wear and natural decay excepted, but hath delivered up the same with broken walls, ruinous, and with floors and other parts thereof worn beyond what was necessary, and so left the same at the end of said term; and so the said plaintiffs say that said defendant (although often requested) hath not kept the said covenants so by him made as aforesaid, nor any of them, but hath broken the same and each of them, to the damage of said plaintiffs, sole surviving covenantees aforesaid, of four thousand dollars; and therefore said plaintiffs bring suit and claim judgment for the sum of four thousand dollars, besides costs.

WM. A. MELOY, *Atty.*

(Endorsed:) Filed Dec. 20, '71. R. J. Meigs, clerk.

11 *Pleas.*

In the supreme court of the District of Columbia this day of January, 1872.

CHARLES STOTT ET AL. }
*vs.* } Law.
WILLIAM RUTHERFORD. }

1st. The defendant, for plea to plaintiff's amended declaration in said cause, says, that the indenture declared upon is not his indenture.

2nd. And for other plea, that defendant has satisfied and discharged plaintiff's claim by payment.

L. G. HINE,
*Atty. for Deft.*

(Endorsed:) Filed 13 Jan., 1872. R. J. Meigs, clerk.

12 *Joinder in issue.*

In supreme court of the District of Columbia the 15th day of Jan'y, 1872.

CHARLES STOTT ET AL. *vs.* WILLIAM RUTHERFORD. } At law. No. 7122.

And the plaintiffs join issue with said defendants upon the several pleas by him pleaded herein.

MELOY,
*For Plffs.*

(Endorsed:) Filed 16 Jan., 1872.

13 *Orders in circuit court.*

FEBRUARY 29th, 1872.

CHARLES STOTT, WILLIAM MCLEAN, James P. Tustin, William L. Waller, Frederick A. Tschiffely, and John M. McCalla, plffs., *vs.* WILLIAM RUTHERFORD, DEF'T. } At law. No. 7122. Cal. 142.

And now come as well the plaintiffs, by their attorney, Mr. Meloy, as the defendant, by his attorney, Mr. Hine, and a jury of good and lawful men of this D istrict, to wit, James Nourse, Wilson King, John Reynolds, James W. Fergerson, George R. Thompson, George Upperman, Joseph P. Stanley, George W. Hatton, Albert G. Hall, James Lavender, Henry Polkinhorn, and James F. King, who, being sworn to try the issue above joined, are respited until the meeting of the court tomorrow. (M. 7, 335.)

14 MARCH 1st, 1872.

CHARLES STOTT, WILLIAM MCLEAN, WILLIAM L. Waller, James P. Tustin, Frederick A. Tschiffely, & John McCalla, plffs., *vs.* WILLIAM RUTHERFORD, DEFT. } At law. No. 7122.

And now again come the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them, on their oath say, they find the issue aforesaid in favor of the plaintiffs; and that the money payable to them by the defendant, by reason of the premises, is the sum of two thousand two hundred four dollars and twenty-six cents, with interest on $250 from Feby. 1, 1869; on $250, part thereof, from Aug. 1, 1869; and on $1,704.26, balance thereof, from October 1, 1869. Defendant gives notice of motion in arrest of judgment and motion for new trial. (M. 7, p. 336.)

15 MARCH 4, 1872.

CHARLES STOTT & OTHERS, PLFFS.,
*v.*
WILLIAM RUTHERFORD, DEFT. } At law. No. 7122. Cal. 142.

And now comes the defendant, by his said attorney, and moves the court to set aside the verdict rendered herein, and to grant him a new trial, and files his reasons therefor. (M. 7, p. 339.)

APRIL 27, 1872.

CHARLES STOTT, WILLIAM MCLEAN, WILLIAM L. Walker, James P. Tustin, Frederick A. Tschiffely, & John McCalla, plffs.,
*vs.*
WILLIAM RUTHERFORD, DEFT.

16 And now again comes the defendant, by his said attorney, and files his bills of exception to the rulings of the court on the trial of this case, duly signed and sealed, and prays that the same may be made a part of the record; and the same is done accordingly. (M. 7, p. 448.)

17 *Bill of exceptions.*

In the supreme court of the District of Columbia this day of , 1872.

STOTT ET AL.
*vs.*
RUTHERFORD. } Law. No.

Be it remembered that, upon the trial of this cause to maintain and prove the issue above joined, the plaintiff offered in evidence to the jury a certain paper-writing purporting to be the said indenture set forth and described in plaintiffs' said declaration, said paper-writing being in words and figures as follows, to wit:

This indenture, made and entered into this fifteenth day of February, one thousand eight hundred and sixty-four, between P. D. Gurley, Charles Stott, William McLean, Will. L. Waller, Jas. P. Tustin,
18 F. A. Tschiffely, Jno. M. McCalla, acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School, of the first part, and William Rutherford, of the second part, all of the city of Washington, District of Columbia, witnesseth that the said parties of the first part, for and in consideration of the rents, covenants, and agreements, hereinafter contained, on the part and behalf of the said party of the second part, his heirs, executors, administrators, and assigns, to be paid, kept, and performed, have granted, demised, and to farm-let unto the said party of the second part, his executors, administrators, and assigns, all that messuage or tenement situate, lying, and being in the said city of Washington, fronting on E street, being lot number four and part of lot number three in square number four hundred and fifty-six on the plan of
19 said city, as now held by said parties of the first part, being bounded on the south by E street, on the west and north by an alley, and on the east by the line of John E. Kendall, together with all and singular the rights, privileges, and appurtenances thereunto belong-

ing, especially to an unfinished brick building on the northern end thereof; to have and to hold the said messuage or tenement as above described to the said party of the second part, his executors, administrators, or assigns, for and during the full term of five years, commencing from the first day of February, one thousand eight hundred and sixty-four, thence next ensuing, and fully to be complete and ended, yielding and paying therefor to said parties of the first part, and their successors or assigns, yearly, and every year during the term hereby granted, the yearly rent of five hundred dollars, lawful money, in equal half-yearly payments, to wit, on the first day of August and the
20 first day of February in each and every year of said term, commencing for the first of said payments on the first day of August next ensuing: provided, always, nevertheless, that if the rent above reserved, or any part thereof, shall be behind or unpaid for the space of twenty days next after the day on which it shall become payable as above, or if default shall be made in any of the covenants hereinafter contained, on the part of said party of the second part, his executors, administrators, or assigns, to be paid, kept, or performed, then from thenceforth this lease shall be utterly void, and said parties of the first part, their successors or assigns, into and upon the said demised premises and every part thereof, may wholly re-enter, and the same shall hold and repossess, as in their former estate therein.

And said party of the second part, for himself, his heirs, executors, administrators, and assigns, hereby covenants to and with said
21 parties of the first part, their successors and assigns, that he, the said party of the second part, his heirs, executors, administrators, or assigns, shall and will yearly, and every year during the term hereby granted, well and truly pay unto said parties of the first part, their successors or assigns, the said yearly rent above reserved, on the days and in the manner limited and prescribed for the payment thereof as aforesaid; that he will pay all taxes and assessments that may be levied or imposed upon said premises by the corporation of Washington or by the United States; that he will, without delay, proceed to place the unfinished brick building aforesaid in a condition of safety from damage by raising the walls thereof to a level with the wall on the north side thereof in all respects in style of work, materials, and thickness of walls as they are at present, and will cover the said building with a substantial roof, keep the same in order during said term,
22 and deliver up the same in good condition at the termination thereof, the necessary wear and natural decay in the use thereof aloneexcepted; and furthermore, that no part of said premises shall be used as a restaurant, tavern, or theater, or for any immoral purpose whatever; and that he will well and truly surrender and deliver up the possession of said premises to said parties of the first part, their successors or assigns, in accordance with the stipulations herein contained, whenever this lease shall terminate.

It is expressly agreed by and between said parties to these presents, that the said party of the second part is at liberty to erect upon said premises such buildings as he may choose for his convenience or interest, and at the end of said term to remove the same if he shall so desire, except such as are connected with the brick building aforesaid.
23 It is also in like manner agreed that if the said parties of the first part, their successors or assigns, shall determine to re-possess themselves of said premises, at the end of said term, they can do so by giving said party of the second part, his executors, administrators or assigns, three months' notice in writing of such intention; whereupon

they will be required also to refund the last year's rent, so far as received, and to discharge said party of the second part from the last payment thereof, equal to five hundred dollars. But if no such notice be given by said parties of the first part, their successors or assigns, then and in that case the said party of the second part will be considered as holding over as a yearly tenant; and the same may be terminated by a like written notice from said parties of the first part, their successors or assigns, to the tenant in possession, three months before the end
24 of said year; and the said parties of the first part, their successors or assigns, will thereupon, at the end of said year, be entitled to re-enter the said premises and every part thereof without any money payment whatever, reserving, however, to said party of the second part, his executors, administrators and assigns, the right of removing any buildings erected by him on said tenement as hereinbefore provided, within one month of the end of said year.

Should the corporation of Washington City levy any tax or assessment upon said premises during said term, said parties of the first part agree to unite with said party of the second part, if he shall so request them to do, in a petition to said corporation for the remission thereof.

In testimony whereof we have hereunto set our hands and seals the day and year first above written.

WM. RUTHERFORD. [SEAL.]
25 P. D. GURLEY. [SEAL.]
CHARLES STOTT. [SEAL.]
WILLIAM McLEAN. [SEAL.]
WM. L. WALLER. [SEAL.]
JAMES P. TUSTIN. [SEAL.]
F. A. TSCHIFFELY. [SEAL.]
JNO. M. McCALLA. [SEAL.]

Witnesses to the signatures of the parties of the first part—
JOS. A. DEEBLE.
CAREY GUYNARE.

Witnesses to the signature of Wm. Rutherford—
JNO. W. ROGERS.

Whereupon the counsel for defendant interposed and insisted that said assumed indenture and demise therein contained, and all covenants therein expressed, were void, and that no action at law could be founded upon any alleged breaches of covenants therein contained, for the
26 reason that said indenture, by its terms, purported to be an indenture between certain persons named therein, "acting as a church extension committee, by authority and on behalf of the general assembly of the Presbyterian Church, Old School," parties of the first part, and defendant of the second part; and that as such parties of the first part, said named persons assumed to demise to defendants said described lands and tenements; and that, in consideration of such assumed demise, defendants covenanted to pay certain rent and other obligations pertaining to said estate in said indenture contained; that said indenture, being executed by said named persons in their individual capacity, conveyed no estate whatever to defendants in said described lands and tenements, because said indenture disclosed the fact
27 that said named persons, who assumed to demise to defendant said described lands, &c., were acting merely as agents or attorneys for the "general assembly of the Presbyterian Church, Old School," in making such demise; and the same being executed by them in their

own proper persons, names and seals, no estate or interest of the said "general assembly of the Presbyterian Church, Old School," was transferred or conveyed to defendant thereby; wherefore there existed no consideration for said alleged covenants of defendant therein contained, and prayed the said justice to exclude and reject said assumed indenture from consideration by the jury, but the said justice held and affirmed that said assumed indenture and demise was not void, and plaintiffs in their individual right might maintain an action thereon.

28 Evidence was also introduced on the trial tending to show that the "general assembly of the Presbyterian Church, Old School," is composed of the representatives of the Presbyteries of that church from all parts of the country. That the trustees of the said general assembly in Philadelphia are an incorporated body under the laws of Pennsylvania to hold title to land in that State, but it is under the direction of the general assembly, which has absolute control of the temporal affairs and property of the church. That the general assembly also appoints committees where it has property, in order to manage it for the benefit of such assembly, and such committees are under its control. That the general assembly has control over the temporal affairs of the church in this District as well as elsewhere, and appointed the

29 committee having charge of the property involved in this action, and have supplied vacancies as they occurred. That the lease was executed by the members of such committee, and that they possessed no estate whatever in said lands, except as pertained to the office of such committee, and have no estate therein in their individual capacity.

It further was proved on the trial that one of the named plaintiffs had departed this life before the commencement of this action, and a person not named as plaintiff had, before suit brought, been appointed by said "general assembly of the Presbyterian Church, Old School," his successor.

And the said justice, notwithstanding said objection of defendant, and proof of death of one of said named plaintiffs, and the appointment as aforesaid of his successor on said committee, and the interposition of an objection of want of proper parties as plaintiffs to the action,

30 permitted plaintiff's counsel to read said indenture of lease to the jury and give the same in evidence to the jury, who gave their verdict against the defendant. Whereupon the said justice having noted said exception upon his minutes before the giving of the verdict, puts his seal, at the request of defendant, to this his first bill of exception, this day of , 1872.

ARTHUR MAC ARTHUR,
*Justice.*

And upon the trial of said cause to defeat plaintiffs' said assumed cause of action, defendant offered in evidence a certain instrument in writing, in words and figures as follows, to wit:

We, the undersigned, for and in consideration of the sum of five dollars, lawful money, do hereby sell, assign, set over, and transfer to John E. Kendall, his heirs, executors, administrators, and assigns, all our right, title, interest, and claim in and to the within lease,

31 and all the rights, advantages, rents, profits, and claims which we have or may have under the within lease and by reason of the agreements and covenants therein contained, and we hereby fully authorize said Kendall, in our name, stead, and place, to take and use all

necessary legal steps to obtain and recover such rights, rents, and profits, and claims as we are or may be, or as he is or may be, entitled to by reason of the within lease or anything therein contained.

In testimony whereof we have hereunto subscribed ourselves and affixed our seals this tenth day of October, 1868.

(Signed,) WM. L. WALLER. [SEAL.]
M. M. McCALLA. [SEAL.]
CHARLES STOTT. [SEAL.]
WILLIAM McLEAN. [SEAL.]
JAMES P. TUSTIN. [SEAL.]

CHAS. E. LATHROP,
GEO. H. BOHRER,
JNO. R. ARRISON,
*Trustees.*

31½ The genuineness of the several signatures to which he duly proved, and offered to prove that, at the time of its execution, the persons who signed said instrument composed the church-extension committee referred to in the paper-writing introduced in evidence by the plaintiff, and that the lease referred to therein was the paper-writing so introduced in evidence by the plaintiffs; but the said justice refused to allow such evidence to be introduced, and refused to allow defendant to introduce said instrument in writing in evidence, whereupon the counsel for defendant made his exception to the said refusal and rejection as aforesaid; and the said justice noted said exception upon his minutes before giving of the verdict, which was against the defendant; and the said justice, at the request of said counsel, puts his seal to this his second bill of exception this day of , 1872.

ARTHUR MACARTHUR, [S. ]
*Justice.*

32 And upon the trial of said cause it appeared in evidence that P. D. Gurley, one of the original lessors, departed this life before the commencement of this action, and in the year 1869; whereupon counsel for defendant prayed the court to instruct the jury that if they found from the evidence that P. D. Gurley, one of the lessors, died before the commencement of this action then the plaintiffs could not recover; which instruction the court refused to grant, but instructed the jury that the suit was properly brought as to parties, and that the plaintiffs, as named in the declaration, could maintain the suit; to which refusal and instruction the counsel for defendant excepted before the jury retired to consider of their verdict, which was against the defendant; and the defendant prays the court to put his seal to this, the
33 defendant' third bill of exception, which is done this day of 1872.

[SEAL.] ARTHUR MACARTHUR, *Justice.*

And upon the trial of said cause the defendant, to defeat plaintiff's assumed cause of action, proved that one Samuel J. Mitchell, previous to the commencement of this action, had, by regular appointment, succeeded P. D. Gurley, one of the original lessors, is still a member of said church-extension committee, in said indenture referred to; and the said defendant, by his counsel, asked the court to instruct the jury that said Mitchell, as such successor, was a necessary party-plaintiff, and that not being joined in the action the same could not be main-

tained; which instruction the court refused to give to the jury, and the defendant excepted before the jury retired to consider of their
34 verdict, which was against the defendant; and the defendant prays the court to put his seal to this, his fourth bill of exception, which is done this day of 1872.

[SEAL.] ARTHUR MACARTHUR, *Justice.*

And upon the trial of said cause the defendant, to defeat plaintiff's cause of action, produced, as a witness in his behalf, one of the plaintiffs in said suit, as likewise one of the lessors; to said demise, to wit, James P. Tustin, who, being duly sworn, gave testimony to show that, before the commencement of said suit, he came to a settlement with the defendant, and accepted and received a check from defendant for the sum of $500.00, in satisfaction of the identical demand upon which said suit was instituted, which said check was duly honored; and other persons gave testimony that two of said committee had been ap-
35 pointed to effect a settlement, if possible, with said defendant, and one refused to act, and never gave his assent to the acts of said Tustin, and that said Tustin acted independently in making said settlement; that his acts were not ratified by said committee; whereupon the counsel for defendant asked the said justice to instruct the jury as follows:

"If the jury find from the evidence that one of the plaintiffs and the defendant had a settlement of the subject-matters of this action, and upon such settlement paid said plaintiff five hundred dollars in consideration thereof, and said sum was received and retained by him, in full satisfaction of all demands under the lease introduced in evidence, then the plaintiffs cannot recover."

Which said instruction, as aforesaid, was disallowed by said justice, and instead thereof he instructed the jury as follows, to wit:

"Mr. Rutherford here contends that he has settled the whole
36 matter with the plaintiffs, and that he has proved the payment of $500.00 to Mr. Tustin, one of the trustees, one of the plaintiffs. In regard to the authority of Mr. Tustin, if he were an agent for the purpose of negotiating with Mr. Rutherford, any settlement which he might make would be binding upon the plaintiffs, because it is quite competent to settle a claim with an agent who is authorized to settle it, and a settlement made with such an agent would be as binding upon the principal as if he had made it himself. One question, then, to be considered by the jury is as to the authority under which this arrangement was made with Mr. Rutherford; the receipt is in evidence, and it appears that he received the money; the $500.00, according to that instrument, was upon the condition that it was accepted by the trustees or the committee. I forget what the language of the
37 receipt is.

Now, if this settlement was to depend upon its acceptance by the other plaintiff here, then it was no settlement. Again, if Mr. Tustin and Mr. Bohrer were both appointed for the purpose of negotiating with Mr. Rutherford, it was a special agency, that is, it was an agency for a particular purpose to settle a particular claim which the plaintiff held against the defendant. Mr. Rutherford, therefore, was bound to take notice of the authority which the agent had, and he had, therefore, no right to settle this claim with one. If the agency in the matter was committed to Mr. Tustin and Mr. Bohrer as joint authority, it could not be executed by one of them alone, but it was necessary, in order to make it binding on the principal, that both of the agents should

act in the matter, at least assent to it. It is not necessary that
38 both should be present at every interview if there were several that took place, but the principle is that they both shall consent to the arrangement, and unless they do, the consent of one would not make it binding upon the other, for Mr. Bohrer could not delegate his share of this authority to his co-agent unless he was especially authorized by the original delegation of authority to them to do so. So that if you shall come to the conclusion, in the first place, that there was a power given to these two agents to settle this matter, and that only one of them participated in it, unless it has been accepted here by all the others, it is not binding.

If you come to the conclusion that there was a settlement, but a conditional one, with Mr. Tustin, and that the condition has not been fulfilled, it has not been accepted, for that was the condition by the proof, the settlement is not binding.

39 "If you come to the conclusion upon the testimony that Mr. Tustin had full authority to act for the other plaintiffs in the matter unconditionally, and that he made an unconditional settlement of it, it will be binding, whatever that settlement was, upon the plaintiffs in the case."

To which rejection and instruction the counsel for the defendants excepted, and the said justice noted said exception upon his minutes before the giving of the verdict, and the said justice now for then puts his seal to this defendant's fifth bill exceptions the day of March, 1872.

ARTHUR MACARTHUR, [SEAL.]
*Justice.*

And upon the trial of said cause the defendant produced as a witness in his behalf one of the plaintiffs to said suit, to wit, James P. Tustin, who gave evidence tending to show that he had received before
40 the commencement of said suit, from defendant, in settlement of the claims arising from alleged breaches of covenant in said indenture, and being the same claims upon which said suit was instituted, a bank check for the sum of five hundred dollars, which check was duly honored. Whereupon the counsel of the defendants prayed said justice to instruct the jury as follows:

"If the jury find from the evidence that either one of the plaintiffs has received from the defendant any money claimed to be due from him to the plaintiffs under said lease, the defendant is entitled to credit therefor against them;" which instruction so prayed for by the defendant was disallowed by said justice, to the rejection of which instruction by said justice, as aforesaid, the counsel for defendant objected, and the said justice noted said objection upon his minutes before the giving of the verdict, and the said justice now for then puts his seal to the defendant's sixth bill of exceptions the day of March, 1872.

ARTHUR MACARTHUR, [SEAL.]
*Justice.*

41 *Affidavit of Wm. A. Meloy.*

In the supreme court, D. C., at general term, Nov. 9, 1872.

CHARLES STOTT ET AL. }
*vs.* } At law. No. 7122.
WILLIAM RUTHERFORD. }

WASHINGTON COUNTY, *ss:*

WILLIAM A. MELOY, attorney for the plffs. in this action above

42 entitled, deposes and says, that since his former affidavit herein was made, he has seen what is alleged to be bills of exceptions herein, and that the same omit a large amount of evidence, given on the trial thereof, material to the questions raised by such bills, and further that sundry of said alleged bills state the evidence contrary to what it in fact was.

WM. A. MELOY.

Sworn to before me Nov. 9, 1872.

R. J. MEIGS, *Clk.*
R. J. MEIGS, JR., *Asst. Clk.*

*Motion to strike from files the bill exceptions.*

In supreme court, D. C., at general term, Nov. 9, 1872.

CHARLES STOTT ET AL. *vs.* WILLIAM RUTHERFORD. } At law.

And now comes the plaintiff, by his counsel, Mr. Meloy, and, upon the affidavits herein filed and the record and files of the court, moves the court now here in general term to strike from the files the alleged
43 bills of exceptions on behalf of the defendant in this action and for judgment for the plffs. upon the verdict hereinbefore rendered, or to remand the said alleged bills of exception to the justice who tried the cause for settlement, and for such other and further relief in the premises as may to the court seem necessary and proper.

(Endorsed:) Filed Nov. 11, 1872. R. J. Meigs, clerk.

*2nd affidavit of Wm. A. Meloy.*

In supreme court, D. C.

CHARLES STOTT ET AL. *vs.* WILLIAM RUTHERFORD. } Law. No. 7122.

WASHINGTON COUNTY, *ss:*

WILLIAM A. MELOY, being duly sworn, deposes and says: I am the attorney, and of counsel for the plaintiffs in the action above entitled. From examination of the record of the court I have learned that
44 bills of exception taken by the said defendant at the trial of said action have been settled, but deponent has never seen any of the said bills, nor has he at any time been able to learn their whereabouts. I have several times caused search to be made for them in the office of the clerk of the court, but with no success, the answer of the clerk being that said bills if ever filed had been taken out by the atty. for the defendant. I have also, on several occasions, enquired of said attorney if they were in his office, and there have been told that they were in the clerk's office aforesaid. Some time after the trial I was served with four bills of exceptions, so called, to which I tendered amendments in settlement, and shortly after I attended the justice who tried the case and presented such amendments and my objections. Said justice then took

the papers with a view to settle those four exceptions and to draft
45 other bills proper to present the evidence material to the instructions asked by said defendant's attorney, and as I am informed the said defdt.'s atty. did subsequently attend the said justice and procured his signature to divers bills of exception, to me unknown, but I had no notice to attend or opportunity of attending the said justice upon any actual settlement of such bills, as is provided in rule 66 of the court, and by reason of these facts I am unable to say whether the appellant herein, the defendant above named, has complied with the 94th rule of the court or not.

WM. A. MELOY.

Sworn to before me this 1st day of November, 1872.

R. J. MEIGS, *Clk.*
R. J. MEIGS, JR., *Asst. Clk.*

SIR: You will please take notice that I shall move the court in
46 general term, at the opening thereof on Saturday next, or as soon thereafter as counsel can be heard on behalf of the plaintiffs, in the action above entitled, upon the foregoing affidavit, with copy whereof you are herewith served, and upon the record in said action, for an order denying the motion for a new trial therein upon exceptions and directing the entry of final judgment upon the verdict therein before rendered. Also, for an order striking from the files the alleged bills of exceptions in said cause, and each of them severally, on the ground that the same were settled, if at all, contrary to the 66th common-law rule of the court, and because they omit material portions of the testimony actually adduced at the trial, and for such further and other relief in the premises as to the court may then and there seem necessary and proper.

Yours, &c.,

WM. A. MELOY,
*Of Counsel for Plffs.*

To L. G. HINE, Esq.,
*Atty. for Defdt.*

(Endorsed:) Filed Nov. 11, 1872. R. J. Meigs, clerk.

47 *Order of court on motion to strike out exceptions.*

CHARLES STOTT AND OTHERS, PLFFS.,
*vs.*
WILLIAM RUTHERFORD, DEFT. } At law. No. 7122.

And now comes the plaintiff, by his attorney, Mr. Meloy, and moves the court to strike from the files the alleged bill of exceptions in behalf of the defendant, and for judgment for the plaintiffs upon the verdict aforesaid; or to remand said alleged bill of exceptions to the justice who tried the cause for settlement; and for such other and further relief in the premises as may to the court seem necessary and proper.

And in support of said motion, the plaintiff, by his said attorney, files the two several affidavits of said attorney, dated respectively the 1st and 9th of November, 1872, together with a notice of his said motion, addressed to L. G. Hine, esq., atty. for defendant.

48 *Aff. of L. G. Hine.*

In the supreme court of the District of Columbia, this 16th day of November, 1872.

CHARLES STOTT ET AL.
*vs.*
WILLIAM RUTHERFORD. } Law. No. 7122

I, L. G. Hine, on oath say that I was attorney and counsel for the defendant on the trial of said cause; that Wm. A. Meloy, esq., counsel & atty. for the plaintiffs, saw and had for several days in his possession all the bills of exceptions in said cause; that he had notice from week to week, verbally, and he agreed to attend the justice who
49 sat on the trial to settle said exceptions; that they were finally and on the last day of the session of the court, (as affiant recollects,) for that term, and about the close of that day's session, regularly examined by said justice, and signed by him; that affiant then left them with the clerk of the court and has no recollection of again seeing them until about the middle of August, when he requested S. T. Thomas, esq., to copy the same for printing. I repeatedly notified said Meloy that I would appear with him before the said justice to settle said exceptions, and waited upon his convenience from Saturday to Saturday, until the last or about the last day of the sitting of the court for that term, and his failure to attend was not because he had not notice of the time and place of such settlement. I informed him the first time I saw him, and soon thereafter, that said exceptions had been signed and filed in
50 the said clerk's office. I served seven proposed bills of exceptions upon said Meloy soon after the trial of said cause. I think said bills fairly set forth the points made by defendant during the progress of the trial, and are supported by the evidence adduced and offered, and if, in the opinion of said counsel for the plaintiffs, they do not be more than six weeks before filing his said motion to ascertain said fact, because affiant is informed by said Thomas that he (Thomas) served copies of the printed bills of exception on said Meloy Sept. 18th, 1872. He had actual notice of the settlement of said bills more than five months before said motion, and if he did not examine them it is not my fault.

L. G. HINE.

Sworn to and subscribed before me this 16th day of November, 1872.
R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Asst. Clerk.*

(Endorsed:) Filed 16 Nov., 1872.

51 *Affidavit of S. T. Thomas.*

Supreme court of the District of Columbia. In general term.

STOTT ET AL.
*vs.*
RUTHERFORD. } At law. 7122.

I, Sidney T. Thomas, on oath say that I am employed in the office of L. G. Hine, esq., attorney for the defendant in the above-entitled cause. That about the first of August last I obtained from the clerk's office of

the above-named court the bills of exception in said cause, (whereas I verily believe they had lain since the 29th day of May previous,) for the purpose of making a copy thereof for the printer; that after making said copy, which was not more than a week, I returned the originals to said office, where they laid until about the 15th of September last, when I again obtained them from said office, in order to compare
52 them with the proof-sheet of the bill as printed. That on the 18th day of September I handed Mr. Meloy, attorney for the plaintiffs, three copies of the printed record containing said bill of exceptions. That about the 1st of October last Mr. Meloy came to our office and asked for the bill of exceptions, when he was answered they were in the clerk's office, to which he answered they could not be found in said office. Whereupon I made dilligent search for them, and in about a week thereafter they were found and returned to the clerk's office by Mr. Hine.

SIDNEY T. THOMAS.

Subscribed and sworn to before me this 15 day of November, 1872.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Asst. Clerk*.

(Endorsed:) Filed 11 November, 1872.

53 *Wm. A. Meloy.—Affidavit of No.* 3.

In supreme court, D. C.

CHARLES STOTT ET AL. } At law. 7122.
*vs.*
WILLIAM RUTHERFORD. }

WASHINGTON COUNTY, *ss:*

WILLIAM A. MELOY, being duly sworn, deposes and says, that upon the trial of this action James P. Tustin was sworn as a witness for said defendant, and in answer to a question by said defendant's counsel testified: "I received $500 from Mr. Rutherford by a check as the agent of the committee. I think it was in October, 1870."

On the cross-examination the same witness testified: "I was appointed a committee, a joint agent with Mr. Bohrer, to wait upon Mr. Rutherford with a view to a settlement of this matter. Mr. Bohrer declined to go, and asked me to act for him; that must have been but a few days
54 antecedent to the time that Mr. Rutherford gave me the money."

Question. Did you give Mr. Rutherford a receipt for that check? To this he answered, "I think I did."

To the question "Is not that it?" (handing him a paper,) he testified "Yes, sir," and thereupon plff.'s counsel read in evidence this receipt, dated Sept. 26, 1870.

To the question "Did you address a letter to Mr. Bohrer?" his answer was "I think I wrote him a letter."

To the question "Look at this, (handing him a paper,) and state whether that is the letter which you addressed to him," said witness answered "Yes, sir," and the letter was thereupon read in evidence.

To the question "Have you ever paid that money to any of the plaintiffs in this suit?" he answered "I have offered to pay it several times. I never could get any body to take it."

And deponent further says that said receipt and letter stated
55 that the $500 check was rec'd by said Tustin conditionally; that it should amount to nothing unless accepted by his joint agent,

said Bohrer, who testified in said cause that he refused to accept the check, money, or settlement proposed. That said receipt and letter are, as he verily believes, in the hands of the judge who tried said action or in the hands of defendant's attorney. That he knew nothing of the alleged settlement of exceptions until a long time after the adjournment of the court, when he was told by defdt.'s attorney that the justice aforesaid had settled the same, and incorporated therein so much of the testimony given in the case; that he wished deponent to meet with him to look it over and see if they could not agree to dispense with a large portion of it, and deponent accordingly waited some time expecting to meet the opposite counsel and settle exceptions on which the
56 motion for new trial could be argued.

WM. A. MELOY.

Sworn to before me this 30 day of Nov., 1872.

R. J. MEIGS,
*Clerk S. C., D. C.,*
R. J. MEIGS, JR.,
*Asst. Clerk, &c.*

(Endorsed:) Filed Nov. 30, 1872, in G. term. R. J. Meigs, clk., by R. J. Meigs, jr., asst. clk.

*Order of court remanding bills of exceptions.*

In the supreme court D. C. in general term.

CHARLES STOTT ET AL. *vs.* WILLIAM RUTHERFORD. } Law. No. 7122.

This cause coming on to be heard upon the plaintiffs' motion herein filed, it is ordered that the bills of exceptions herein presented by the defendant be remanded to the justice who tried the action at
57 circuit, on account of defects apparent therein; and with the consent of the counsel of the respective parties, that said justice settle anew the fifth and sixth bills of exception by the insertion therein of the evidence given on said trial by the witnesses James P. Tustin and George A. Bohrer, and of a copy of the receipt mentioned by them in lieu of the statement of evidence now contained in the fifth and sixth bills aforesaid as presented.

By order of the court.
(Indorsed:) Entered 2 M. G. T. 118. 12—7–72.

*Settlement of 5 & 6 bills of exceptions.*

Settlement of 5th & 6th bills of exceptions as ordered by gen'l term, December 7, 1872.

See Z. M., 118.

CHARLES STOTT ET AL. *vs.* WILLIAM RUTHERFORD. } At law. No. 7122.

58 In pursuance of the order of the general term of Dec. 7, 1872, the justice who tried the action certifies that he has settled anew

the fifth and sixth bills of exceptions by inserting therein the evidence given on the trial of said action by the witnesses, James P. Tustin and George A. Bohrer. And it is agreed by the counsel for both parties that the statement contained in the general charge of the court to the jury of the receipt mentioned in such order may be taken in lieu of and as a correct representation of the substance of such receipt.

And the said justice now for then puts his hand and seal to this amended bill of exceptions this sixth day of February, A. D. 1873.

ARTHUR MACARTHUR, [SEAL.]
*Justice.*

(Indorsed:) Inserted in 2 M. G. T. 139.

59 The evidence of the witnesses, James P. Tustin and George A. Bohrer, cannot be found among the papers in this case, or elsewhere in my office; but I find a printed document containing what purports to be their testimony in this case, referred to in the last order, among the papers on file, and which is as follows:

R. J. M., *Clerk.*

*Testimony of Tustin & Bohrer.*

The testimony of Messrs. Tustin and Bohrer was as follows:

GEORGE A. BOHRER sworn.

By Mr. Hine:

Q. Are you one of the plaintiffs in this case?

A. I am one of the Metropolitan committee.

Q. Answer the question I asked.

A. I believe not.

Q. Will you look at this paper and state whether or not this is your signature?

A. It is. It is the assignment.

60 Witness then testifies to the genuineness of all the other signatures.

Mr. HINE. I now propose to read what purports to be an assignment, made on the tenth day of October, 1868, of this lease. The lease runs to these parties and their assigns and successors. I propose to read the instrument that I have just proved to be the signatures of part of these defendants and others, in evidence as an assignment of all their right and title under the power they have in the original lease to make the assignment, and made long before this suit was commenced.

(Offer rejected; exception reserved.)

Mr. HINE. I will state my offer a little more definitely: I offer to read in evidence an assignment by the plaintiffs of all their right and title to the rents and profits growing out of the premises described in the original lease.

61 Mr. HINE. I propose to read in evidence the record of the other suit, showing the capacity in which these parties supposed they were executing this instrument, and to show——

By the COURT. What other suit do you refer to?

Mr. HINE. The action brought on this identical lease by these and other parties, as a committee or agents of the church named in the lease.

The COURT. I will let you introduce that record.

(Exception by Mr. Meloy.)

Mr. HINE. I offer to show that the legal title in these premises—the legal and equitable title in the premises—never was in the plaintiffs in this action.

(Offer rejected, and exception reserved.)

By Mr. HINE:

Q. State whether you are the party-plaintiff in a suit against Mrs. Rutherford, claiming identically the same relief that is claimed by the plaintiffs in this suit.

(Objected to; objection sustained, and exception reserved.)

62 JAMES P. TUSTIN sworn.

By Mr. Hine:

Q. I show to the witness the lease introduced in evidence here by the plaintiffs, and ask if that is his signature?

A. That is my signature.

Q. Do you know the defendant, Wm. Rutherford?

A. I do.

Q. What interest, if any, had you at the time of the commencement of this suit, or since its commencement, in the property described in the lease?

(Mr. Meloy objects; objection overruled. Exception reserved by Mr. Meloy.)

A. I had not any.

Q. Under what authority, and at whose instance, if not your own, was this instrument executed?

(Objected to by Mr. Meloy; objection overruled; exception reserved.)

63 A. The members of the church-extension committee of the Presbyterian Church—the committee of the Presbyterian Church, of the general assembly.

Q. How was that authority derived?

A. The committee was established by the general assembly of the church; appointed for church-extension purposes here in Washington.

Q. How were you appointed, if in any way, on a committee to execute this lease?

A. I derived my appointment directly from the general assembly of the church.

Q. Were you acting in your individual capacity as agent for that church at the time of the execution of the lease?

A. I was acting in my individual capacity.

Q. For and on whose behalf were you acting?

A. Presbyterian Church, Old School at that time.

64 Q. State whether at any time you ever made any settlement of the matter arising under that lease with Mr. Rutherford; and if yea, when, and by what authority.

(Objected to by Mr. Meloy. Objection overruled and exception reserved.)

A. I received $500 from Mr. Rutherford by a check, as the agent of the committee. I cannot state exactly the time. I have a memorandum at my office, but I did not bring it here this morning.

Q. Who composed the committee that authorized you to do this? Did you receive the money upon the check?

A. Yes, sir.

Q. Who constituted that committee?

A. A Mr. Waller, Mr. Chas. Stott, Rev. Dr. Johnson, Rev. Dr. Gurley,

Mr. Schiffely, and Mr. McLean, and a number of gentlemen were added by reason of resignation of others.

Q. When was it you made this settlement, as they call it?

65 A. I think it was in October, 1870. I am not absolutely positive about it, but it was about that time.

Q. Was Mr. Rutherford in possession of the premises at that time?

A. I think he had removed.

Q. Was this action brought with your consent or knowledge?

A. It was brought with my knowledge, but I always opposed its being brought.

Cross-examination by Mr. Meloy:

Q. Have you that check?

A. I do not know.

Q. Where is it?

A. That is more than I can say.

Q. Did you not, in this court, soon after the commencement of this action, and after a claim of settlement and payment had been made just about the time it was brought for trial before, tell me that you had not received one dollar?

66 A. Never.

Q. Did you tell me anything to that effect?

A. I do not remember that I did.

Q. You say that you settled the action with Mr. Rutherford, as the agent for these parties?

A. I was appointed a committee—a joint agent with Mr. Bohrer—to wait upon Mr. Rutherford, with a view to a settlement of this matter. Mr. Bohrer declined to go, and asked me to act for him. That must have been but a few days antecedent to the time that Mr. Rutherford gave me the money. I think it was the last of September or 1st of October, 1870.

Q. Where did you meet Mr. R.?

A. At his place of business, on N. Y. avenue, between Fourteenth and Fifteenth streets.

Q. Had you at that time been acting as counsel and advisor in regard to this claim?

A. I had not, except in one particular.

67 Q. What was that?

A. Well, I do not know as I am absolutely obliged to divulge anything that took place.

Q. Then you were acting as his counsel, in reference to this matter, in one particular?

A. He came to see me, but not in reference particularly to the suit, but in reference to another matter connected with the negotiation.

Q. Connected with this matter?

A. Yes, sir; it had some bearing on it.

Q. Did you give Mr. Rutherford a receipt for that check?

A. I think I did. I haven't it with me.

Q. Is it in your possession?

A. It is not.

Q. Is not that it? (Holding witness a paper.)

A. Yes, sir.

Q. How long after you received this check you speak of before you obtained the money upon it?

68 A. I think the same day I took it to Riggs' bank and deposited it.

Q. Did you consult the other members of the committee with regard to the acceptance of that check as a settlement?

(Objected to by Mr. Hine; objection overruled; exception reserved.)

A. I do not remember whether I did or not.

Q. Did you address a letter to Mr. Bohrer?

A. I think I wrote him a letter stating that I had received the money. It was on deposit at Riggs' bank. I am not sure what the nature of the letter was.

Q. Was that before or after you had received the money?

A. I apprehend it was after.

Q. Look at this, (handing witness a paper,) and state whether that is the letter you addressed to him.

69 A. Yes, sir.

(Mr. Meloy offered the letter in evidence; objected to by Mr. Hine; objection overruled; exception reserved.)

Q. After you wrote that letter and sent it to Mr. Bohrer, did you receive any reply from any person in regard to it?

(Objected to by Mr. Hine as immaterial; objection overruled; exception reserved.)

Q. Did you receive any reply to this letter?

A. I received a letter. Whether it was in reply to that, I am not sure.

Q. Have you that letter with you?

A. I have not.

Q. State what that reply was.

(Objected to by Mr. Hine; objection sustained.)

Q. Do you know where that letter is?

A. I cannot say certainly. I do not always preserve them. I might have destroyed it.

70 (Mr. Meloy read the receipt dated September, 1870.)

(Objected to by Mr. Hine; objection overruled; exception reserved.)

Q. Have you ever paid that money to any of the plaintiffs in this suit?

(Objected to by Mr. Hine; objection overruled, and exception reserved.)

A. I have offered to pay it several times. I never could get anybody to take it.

Q. Have you not, since you have held it, told Mr. Rutherford that you would allow him interest upon it?

A. No, sir; never.

By the Court:

Q. State whether this General Assembly of the Presbyterian Church, Old School, is an incorporated body?

A. There are trustees of the General Assembly of the Presbyterian Church that are incorporated for the purpose of holding real
71 estate and so on. They have their residence partly in Philadelphia. The Assembly meets there every two years, for the purpose of electing trustees resigned and that have died, that the title to the property may be preserved.

By Mr. Meloy:

Q. Did you not know that the property for the benefit of the Presbyterian Church, Old School, is held sometimes in the names of other than those trustees you speak of?

(Objected to by Mr. Hine as immaterial and incompetent; objection overruled; exception reserved.)

WITNESS. I have never investigated that subject at all.

Q. This letter states you will not use the check until you have learned that it is accepted by the parties who have brought this suit. Will you now state what parties they were? I will show you a paper, and
72 ask you if that is the record of the suit you refer to in this letter?

A. Some of the parties are not named correctly. "George C. Williamson." There is no such name as George C. Williamson, as I know of.

Q. Upon what conditions was it that this money was received?

A. I called upon Mr. Rutherford and told him that the committee were very anxious to have this matter settled in some shape, and he said he was prepared to pay $500. He said he had agreed to pay that, and that he would do what he could towards having the taxes on the property remitted. That is about the substance of what he said to me. He then handed me the check for the $500, which I took, and fearing it might be lost in one way or another, in passing around the city, I deposited it. He complained at the time, I remember, of the committee having been harsh upon him. I told him that harshness was
73 not with my consent; that I was always for mercy rather than distress, but I thought that they were all kindly disposed towards him, as far as I knew—the gentlemen composing the committee.

Mr. Meloy read receipt for check.

GEO. A. BOHRER recalled.

By Mr. Meloy:

Q. Were you authorized by the other parties, plaintiffs, in this city, to bring an action?

A. I believe that Mr. Tustin and myself were appointed a committee to bring this suit, and for no other purpose, to my knowledge.

Q. Did you wait upon an attorney to have the suit commenced?

A. I did, with Mr. Tustin.

74 Q. Some time after the suit was commenced, did you see Mr. Rutherford and have a conversation with him with regard to this $500 check?

A. Yes, sir; several times. The last time, he called at my house at night. He wanted to compromise. I told him I had no authority to compromise. That was within two months past. He said that he had given a check to Mr. Tustin for $500, which was conditional on its being received, and that he insisted after giving that check, and heard that it was not received, that possibly he had used some of the money. He went to inquire about it and found that Mr. Tustin had drawn the money, and that Mr. Tustin proposed to give him ten per cent. for the use of the money which he then held.

Q. Did you at any time have a conversation with Mr. Tustin in regard to his acceptance of that check?

75 A. I believe so; several times. To the best of my recollection Mr. Tustin said that he had received the check conditionally upon the committee receiving it.

Q. What, if anything, did Mr. Tustin say to you with regard to his having received the money from that check?

A. That he had received a check from Mr. Rutherford conditional upon the committee receiving it.

Q. How about the money?

A. I best recollection is that he never used it. I know there was a conflict between him and Mr. Rutherford in regard to it.

By Mr. Hine:

Q. Are you one of the plaintiffs in this action?

A. I suppose so.

Q. What interest, if any, have you in the subject-matter of this
76 suit?

A. None except as a trustee of the Presbyterian Church of the General Assembly.

Q. Under whose direction, and by what authority, did you act as a member of that committee that you speak of?

A. I do not remember in the first instance, but I was appointed by the general assembly as trustee. I think about '68 or '9.

Q. Did you, as such agent, bring an action upon this same lease against Mr. Rutherford, in connection with others?

A. By the direction of the committee, I was appointed, in connection with Mr. Tustin, for the express purpose of bringing this action.

Q. At the time the action was brought, were you a member of that committee?

A. I was.

Q. And appointed by the same authority that the committee was appointed by?

A. That I am in doubt about.

77 Q. Did you at one time send for Mr. Rutherford for the purpose of effecting a compromise of this case—a settlement of it?

A. I went to Mr. Rutherford before he left the place, and he said that he would pay the rent and leave the place.

Q. What reason did you give to Mr. Rutherford why you wanted him to leave the place?

A. I do not remember, except for the purpose I have already stated. He had not paid the rent, and we wanted possession of the place.

Q. Will you state who, on the third day of June, 1870, constituted this committee?

A. I cannot now remember all the members.

78 *Orders of the court in general term.*

79 CHARLES STOTT & OTHERS, PLFFS., *vs.* WILLIAM RUTHERFORD, DEFENDANT. } At law. No. 7122. February 5, 1873.

Argued in part by Mr. Hine for the appellant.

CHARLES STOTT & OTHERS, PLFFS., *vs.* WILLIAM RUTHERFORD, DEFT., } At law. No. 7122. Feb'y 7, 1873.

Argument continued by Mr. Meloy for plaintiffs, and concluded by Mr. Hine for defendant, and case submitted to court.

CHARLES STOTT & OTHERS *vs.* WILLIAM RUTHERFORD. } At law. No. 7122. March 1, 1873.

80 And now again come here as well the plaintiffs as the defendants, by their respective attorneys, and it appearing that the four justices of this court before *before* whom the cause was

argued and to whom it was submitted, are equally divided in opinion upon the question involved in the cause; & the defendant, having thereupon, by his attorney, filed with the clerk of the court a motion in writing to have the said cause re-argued before the five justices: It is thereupon ordered by the court that the said motion be, and the same is hereby, allowed.

81 CHARLES STOTT & OTHERS, PLFFS., *vs.* WILIAM RUTHERFORD, DEFT. } At law. No. 7122. April 25, 1873.

Argued by Messrs. Hine, of counsel for defendant, and Mr. Meloy, of counsel for plaintiff.

CHARLES STOTT & OTHERS, PLFFS., *vs.* WILLIAM RUTHERFORD, DFT. } At law. No. 7122. April 28, 1873.

Argument resumed and continued by Mr. Meloy, of counsel for plaintiff, and concluded by Mr. Cox, of counsel for defendant.

CHARLES STOTT, WILLIAM MCLEAN, WILLIAM L. WALLER, JAMES P. TUSTIN, FREDERICK A. TSCHIFFERLY, and JOHN M. MCCALLA, plffs., *agt.* WILLIAM RUTHERFORD, DEFENDANT. } At law. No. 7122. June 7, 1873.

And now again come here as well the plaintiffs as the defendant, by their respective attorneys, whereupon, because it appears to the
82 court here that the plaintiffs cannot maintain their aforesaid action, therefore it is considered that, notwithstanding the verdict aforesaid in their favor, the plaintiffs take nothing by their suit, and that the defendant go thereof without day, and recover against said plaintiffs his costs by him about his defense in this behalf expended, to be taxed by the clerk, and have execution thereof.

83 *Opinion of court in banco.*

Opinion of the court in general term, delivered June 7th, 1873.

Mr. Justice WYLIE delivered the opinion of the court:

This is an action brought by lessors against a lessee, on the covenants of the latter to pay rent and taxes, and to put and keep the premises in a certain condition of repair. The lease declares as follows: "This indenture made," &c., between P. D. Gurley, Charles Stott, Wm. McLean, Will L. Waller, Jas. P. Tustin, P. A. Tschiffeley, and John M. McCalla, acting as a church-extension committee, by authority and on behalf of the general assembly of the Presbyterian, Old School, of the first part, and William Rutherford, of the second part, all of the city of Washington, D. C., witnesseth:

The lease was for five years from the 1st day of February, 1864, at a rent of $500 a year, payable half-yearly to the lessors, their suc-
83½ cessors, or assigns, and contained a covenant on the part of the lessee to pay the rent, as well as all taxes and assessments, and to put in repair a building on the premises which had been falling into decay; and at the expiration of the term, to surrender and deliver up

the possession of said premises to the said parties of the first part, their successors or assigns."

It contains other stipulations also, to be observed by the lessee, which are not material in this controversy.

A lease of real estate which sets out on its face that the lessor has no interest of his own in the subject, but that he assumes to act in the matter on behalf of the owner who is named, but which contains reciprocal covenants to be performed by the parties respectively, one of which is a covenant on the part of the lessee to pay the rent to
84 the lessor, as in his own right, and which is executed by the parties in the usual form, as between individuals contracting in reference to their own property, is a nullity.

It is a nullity as to the owner, because it is not his contract; it is a nullity as to the lessor, because he has no estate in the property; and it is a nullity as to the lessee, because it is not binding on the other side. And that was the contract in the present case. The owner, it is true, might maintain his action against the tenant in such a case, for use and occupation, but not on this contract.

The rule that a tenant shall not be allowed to dispute his landlord's title, has no application to such a case. The tenant himself is thus estopped, but others are not. If the lessor himself shows that he had no title, or if the tenant be evicted by a paramount title, or if the
85 lessor's estate have come to an end before the expiration of the term, the rule does not apply. To say that the tenant is estopped from setting up a defence which is valid on the very face of his lease, would be estoppel reversed.

In Frontin v. Small, (Ld. Raym. R., 1418,) the lease was made by an agent in his own name, but the rent was to be paid to the owner. The rent being in arrear, the agent sued the tenant on his covenant to pay; and defendant demurred to the declaration, for the reason that it appeared on the face of the contract that the agent was not the owner of the property, and therefore the lease was void. For the plaintiff, it was argued that the lease being under seal, the tenant was estopped to deny its validity. But the court held that the lease was void on its face, because it showed that the lessor had no interest in the land, and
86 could not be upheld even by the covenant that the rent was to be paid to the owner. (See Selw. N. P., 538–40.) And in 2 Kent's Com. it is laid down that an "attorney who executes a power, as by giving a deed, must do it in the name of his principal; for if he executes it in his own name, though he describes himself to be the agent or attorney of his principal, the deed is held to be void, and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of his principal," citing many authorities.

It may seem inequitable that a tenant who has entered into and enjoyed the use of property under a lease like the one now in question, should not be obliged to comply with his covenants. This argument was urged by plaintiff's counsel in the case of Frontin v. Small,
87 but the court held "that it appearing on the declaration that the lease was void because it was not made in the name of James Frontin, whose house it appeared to be, and that the plaintiff only made it as his attorney, there could be no estoppel; and then the covenant to pay the rent was void, and the plaintiff could not maintain the action."

In Croade v. Ingraham, 13 Pickering, 35, Shaw, C. J., said:

"Nor does the doctrine of estoppel, or the maxim of nil habuit in tenamentis apply. Here it appears, on the face of the instrument itself,

that the plaintiff intended to transfer to Jabel Ingraham, by the instrument called a lease, all the right which she had to have dower assigned to her; and it is a general rule, governing the doctrine of estoppel, that where the truth appears on the face of the instrument itself upon
88 which the estoppel is alleged to arise, no estoppel is wrought as to the fact thus appearing."

In the present case the record shows that the plaintiffs were not even vested with the legal estate in the property which they undertook to demise. They were simply agents, "acting as a church-extension committee by authority and on behalf of the general assembly of the Presbyterian Church, Old School." The contract on its face shows that they were a committee only, acting on behalf of a principal whose name is set out, and to whom the property belonged. It is said, however, that the Presbyterian Church, although a body constituted of many members, residing in all parts of the country, is not a corporate body, and, in matters of this character, is obliged to employ the agency of committees. That may be true, and, if so, the church, eo nomine, could
89 not maintain any action in court. But the title to this property must have been vested, at the time this contract was entered into, in some one or more persons in trust for the church; otherwise the instrument in question would be doubly void, showing that the plaintiffs had no title themselves, and were representing a body of men who could have none.

But in fact it was shown at the trial in the circuit court, as well as on the argument in this, that a corporation exists under an act of the legislature of Pennsylvania, consisting of trustees empowered to hold the title and manage the temporalities of the whole church, wherever the property may be situated. This corporation is styled "The Trustees of the General Assembly of the Presbyterian Church in the United States of America." The act incorporating this body, to be sure, contains
90 a limitation as to the amount of property which these "trustees" are authorized to hold in trust for the church; and if that limitation had been already reached, it may have become necessary that private trustees should be appointed by the church to receive the conveyance of other property for its use. How the fact was in this respect as to the present case does not appear. But in either of these aspects the action should have been brought by some other party than these plaintiffs. Had the instrument of demise in question been silent as to the agency of the lessors, the defendant might have been estopped to deny their title, or his own liability to them under the contract. As it is, the doctrine of estoppel operates against them, and not against the defendant.

91 These considerations dispose of the present action under well-settled principles of special pleading, which we are not at liberty to disregard without disturbing the whole order and consistency of that branch of the law, and unsettling principles which are necessary for the protection of rights themselves.

The other matters of defence of a less technical character, including the payment of $500 to one of these plaintiffs for compromise of this claim, it is unnecessary to pass upon.

The judgment should be reversed and judgment entered for the defendant non obstante veridicto.

(Endorsed:) Filed June 7, 1873. R. J. Meigs, clk., by R. J. Meigs, jr., asst. c.

*Dissenting opinion of MacArthur.*

Mr. Justice MacArthur, with whom Mr. Justice Humphreys concurred, dissented.

92 *Opinion of Justice McArthur.*

While I agree that the authorities referred to, in the learned opinion just read, sustain the position that a deed executed by an agent or attorney, in his own name, is inoperative as to the principal, whether the name of the latter appears upon the face of the instrument or not, yet I am very clear that this rule can have no application to the case at bar. The lease under consideration is executed by the lessors in their own names and with their own seals. The name of no principal is added. The operative words of letting in such a deed import an estate in the parties demising, and the lessees cannot impeach it for any reason not appearing upon its face. The form of executing it is the one usually adopted by persons in contracts respecting their own interests,
93 and there can be no pretence in the concluding part of it that it purports to be their act as agents.

In the first clause the parties of the first part describe themselves as "acting as a church-extension committee, by authority and on behalf of the general assembly of the Presbyterian Church, Old School," and it is argued that these words disclose the name of their principal and render the deed a nullity. It seems to me that this addition to the names of the plaintiffs, as was said in Taft v. Brewster, 9 John., 334, is a mere descriptio personarum. So far from showing a principal, it has been decided in the highest court of Pennsylvania that the general assembly had no recognized legal status. It is a mere voluntary association, utterly incapable of holding an estate in land, or of being a principal in any transaction, or delegating a legal power to be executed by others.
94 In order to render this lease void, under the authorities cited for that purpose, it must appear upon its face that the plaintiffs acted solely as agents; that the name of the principal for whom they acted was mentioned in the body of the instrument, and that it was possessed of the title affected; and that such principal was either a natural person, or a corporation having legal capacity to hold interests in real estate, and to grant authority to others to execute sealed instruments in their name; for unless all this appears on the face of the lease, it does not fall within the principle of these citations. In my opinion it is not desirable that this technical and rigid rule of the common law should be extended to cases not clearly within the adjudication. To allow a lessee, who has accepted the lease and enjoyed possession
95 of the premises for a considerable portion of the term, to escape from paying the stipulated rent, violates every principal of justice and equity. I do not believe such to be law.

As, therefore, there is nothing on the face of the deed to affect its validity, there is no rule better settled than that the lessee is estopped from impeaching it.

But even if the plaintiffs had mentioned a competent person or corporation in the body of the instrument as their principal, it would not follow as a necessary consequence that its covenants would be void as against themselves. The covenants contain words sufficiently expressive of their intention to be bound in their personal capacity. "If one covenants in his own name, though it be expressly in auter droit,
96 and in a representative capacity, as executor, guardian, trustee,

committee, agent, or otherwise, he is himself personally bound." (1 Am. Leading Cases, and cases cited in note.) Duvall vs. Craig, 2 Wheaton, 45, was where a conveyance of real estate contained covenants against incumbrances, and the covenantors added, after their names, "as trustees," &c. Mr. Justice Story remarks, in delivering the opinion: "A trustee, merely as such, is only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law for a breach thereof, in the same manner of any other person, although he describe himself as covenanting as trustee; for in such case the covenant binds him personally, and the addition of the words "as trustee,"
is but matter of description to show the character in which he acts,
97 for his own protection, and in no degree affects the rights or remedies of the other party. The authorities are very elaborate on this subject; an agent or executor, who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal." And the case of Lutz v. Linthicum, 8 Pet., 165, is to the same effect. So here it may be emphatically said that these plaintiffs "had no principal to bind." The authorities are numerous on this point, and seem to be clear that the agent may bind himself, if his covenants are personal to himself, even although his representative capacity appears on the instrument. As the covenants are
of that character here, it is apparent they must be equally bind-
98 ing upon the defendant. My conclusion is that the lease is the deed of the plaintiffs, and they should be permitted to retain the judgment. I am opposed to a reversal.

(Endorsed:) Filed June 7, 1873.

99 In the Supreme Court of the District of Columbia, the day of , 18 . In error.

CHARLES STOTT ET AL.
*vs.*
WILLIAM RUTHERFORD. } At law. No. 7122.

Know all men by these presents, that we, Charles Stott, George A. Bohrer, are bound unto the above-named William Rutherford in the sum of five hundred dollars, to be paid to the said William Rutherford, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 19th day of June, 1873.

Whereas the above-named Charles Stott and others have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Charles Stott and others shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

G. A. BOHRER. [SEAL.]
CHARLES STOTT. [SEAL.]

Sealed and delivered in presence of—
Z. W. CROMWELL.

(Endorsed:) Approved Nov. 21, 1873. MacArthur, justice.

100 *Affidavit of Wm. A. Meloy on back of bond for writ of error.*

DISTRICT OF COLUMBIA,
*County of Washington, ss:*

William A. Meloy, attorney for the plaintiffs in error in the action within entitled, deposes and says, that on the 19th day of June, 1873, he presented a bond, of which he believes the within to be a duplicate, to his honor Mr. Assistant Justice Humphreys, of the supreme court, D. C., who then & there endorsed on the same his approval thereof; whereupon deponent immediately took such bond, and left it, together with his petition on behalf of said plaintiff for a writ of error in said cause, in the office of the clerk of said court, since which time he has not seen or known its whereabouts.

WM. A. MELOY.

Sworn to before me this 20th day of November, 1873.
R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Asst. Clk.*

101 *Petition attached to bond for writ of error.*

In Supreme Court, D. C.

CHARLES STOTT ET ALII
*vs.*
WILLIAM RUTHERFORD.

*To the Hon. Justices of the Supreme Court of the District of Columbia:*

The petition of the plaintiff, in the action above entitled, respectfully represents that final judgt. was rendered against your petitioners in the said action on the day of 1873, by which feeling aggrieved, they desire to prosecute a writ of error (with a supersedeas) from the same to the Supreme Court of the United States, which writ they hereby pray may be allowed upon giving bond as required by law.

WM. A. MELOY.

Nov. 20, 1873.
(Endorsed:) Filed Nov. 21, 1873. R. J. Meigs, clerk.

102 *Authentication of record—Clerk's certificate.*

CLERK'S OFFICE,
*Supreme Court of the District of Columbia:*

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 28th day of November, 1873.

[SEAL.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD, *Assistant Clerk.*

(Indorsement on cover:) No. 350. Dist. of Columbia, sup. court. Charles Stott, William McLean, William L. Waller, James P. Tustin, Frederick Tschiffely, & John A. McCalla, plaintiffs in error, vs. William Rutherford. Filed 8th December, 1873.

# Supreme Court of the United States.

OCTOBER TERM, 1875.

CHARLES STOTT *et alii*, Plaintiffs in Error,
*vs.*
WILLIAM RUTHERFORD, Defendant in Error.
No. 123.

## ABSTRACT OF CASE.

This case comes here on writ of error from the Supreme Court of the District of Columbia.

On the 20th day of December, 1871, the plaintiffs filed their declaration against the defendant in the Supreme Court of the District of Columbia for breach of covenants in a certain lease of real estate, executed by the plaintiffs to and with the defendant on the 15th of February, 1864, and claiming damages for arrears of rent, etc., to the amount of four thousand dollars. To this declaration the defendant plead that the indenture declared upon was not his indenture, and that he had satisfied and discharged the plaintiff's claim.

At the January Term of the Court, (February 29, 1872,) the cause came on to trial, and the plaintiff, to prove his case, offered to read in evidence the indenture set forth at folios 18 to 25 inclusive of the record, whereupon the defendant objected that the instrument was, on its face, void and a nullity in law. The court overruled the objection, and allowed the instrument to be read in evidence, to

which ruling the defendant excepted, and this forms the ground of the first bill of exceptions.

The plaintiffs then proved the death of Dr. Gurley, one of the original lessors, and the breaches of the covenants of the lease, and thereupon rested their case.

The defendant then offered to read in evidence the assignment of the lease set forth at folio 31 of the record, but the court refused to allow the same to be read to the jury, and this is the ground of the defendant's second bill of exceptions.

It was further proved on the trial that the "General Assembly of the Presbyterian Church, Old School" was not an incorporated body, but consisted of presbyters and elders from all the presbyteries of the Presbyterian Church, Old School, throughout the United States, annually chosen, who met in convention to consider and attend to the interests of the church; that in Pennsylvania there was a corporation under the laws of that State styled "The Board of Trustees of the General Assembly of the Presbyterian Church in the United States of America," created for the purpose of holding title to real estate for the benefit of the General Assembly; that elsewhere the General Assembly designated persons as trustees and committee to take the title of real estate and to manage it for the benefit of the Church; that subsequent to the death of Dr. Gurley the General Assembly had designated the Rev. Samuel J. Mitchell to supply his place, and that he was, at the commencement of the action, a member of the Church Extension Committee referred to in the lease.

That in September or October, 1870, the committee appointed Mr. Bohrer and Mr. Tustin agents to settle the matter in controversy; that Mr. Tustin received from the defendant his check for $500 in settlement, provided that such settlement should be acceptable to the committee; but the other joint agent refused to consent to the arrangement, and the committee declined to receive the money.

The evidence being all in, the defendant prayed the court to instruct the jury that if they found the death of

P. D. Gurley, the plaintiffs could not recover, which prayer being refused forms the ground of the third exception.

The defendant also prayed the court to instruct the jury that S. J. Mitchell was a necessary party plaintiff, and not having been joined, the action could not be maintained, which having also been refused forms the ground of the fourth bill of exceptions.

The cause having been submitted to the jury, they duly returned their verdict in favor of the plaintiffs for $2,204.26, with interest.

On the 27th of April the defendant, having before moved the court to set aside the verdict and to grant him a new trial, filed —— bills of exceptions, including the four above-mentioned and two others so called, appearing on pages 10 and 11 of the record.

At the next convening of the court in General Term the plaintiff's counsel moved to strike from the files the alleged bills of exceptions for irregularities specified in moving affidavits set forth in folios 41, 42, 44, 45, and 53 to 56, and for judgment upon the verdict rendered. On the argument of this motion the General Term denied the motion made, but ordered the bills of exceptions sent back, and directed the justice who tried the cause to insert in the 5th and 6th bills, in lieu of the statements of evidence therein contained, the evidence given on the trial by Tustin and Bohrer. The said justice thereupon certified that he had done so, and the cause was argued upon the evidence presented on pages 17 to 22 inclusive of the record.

The court, by a majority of three to two, pronounced judgment for the defendant on the first exception, *non obstante veredicto.*

It is claimed that the court in General Term erred, in sustaining the first exception raised by the defendant, and in determining as a matter of law that the plaintiffs could not maintain any action upon the lease offered in evidence.

It will hardly be contended in this court that if R cove-

nant with seven lessors to pay rent, and five of them sign and seal an instrument which, by its terms, purports to transfer to K all their interest under the covenants, with power to sue upon such covenants *in their name*, that an action is improperly brought in the name of the original lessors.

Cf. 1 Ch. Pl., 2 and 3, and n. (2.)

*Non constat*, K brings the suit in their name, pursuant to the letter of the authority given.

Besides, the instrument, though signed and sealed by the five, was never delivered; and no instrument has force until delivery.

Neither will it be contended that when, subsequent to covenant broken, one of the lessors dies, the action is not properly brought in the name of the six survivors.

Neither can it be argued that, when two joint agents are appointed to do a particular thing, one can act in the premises, regardless of his associate in the agency, and in opposition to him, so as to bind either that associate or their common principal.

Story on Agency, § 42.

If we are right in these seemingly plain and elementary propositions of law, there remains for determination merely the question whether the lease offered in evidence was void upon its face.

The plaintiffs style themselves in the lease, Charles Stott (*et al.*) "of the first part." It is "the said parties of the first part" that, in consideration of the rents, covenants, &c., grant, demise, and to farm let the messuage, to have and to hold, to the party of the second part, for a term. In case of default, it is the same "parties" who are to "re-enter and re-possess." It is "between said parties" that agreement is made, and "said parties of the first part" bound to refund the last year's rent, &c. And, finally, it

is these parties, in their individual name, who set their hands and seals, not the hand and seal of any other, as their principal, to the instrument. In that gushingness so natural to many men when they have a religious society the beneficiary of their labors, these parties sought to insure Rutherford's prompt payment of rent as a matter of conscience, by parenthetical allusion to the fact that they were "acting as a committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School." And now we are told by three of the five justices of the court below that this parenthetical ebullition—this morsel of religious vanity, so to speak—works paralysis of every legal obligation in the instrument; that *it declares on the face of the lease*, 1st, that the parties of the first part have no interest in the subject; 2d, that the "General Assembly of the Presbyterian Church, Old School," was the actual owner of the property with which these men were meddling, "as individuals contracting in reference to their own property."

This is a large and comprehensive inference, and if it be true, we may as well admit the fatal consequences somewhat unnecessarily argued from it. But does the instrument show this?

A body without enduring individuality cannot own property. It is a body of which the law can take no cognizance. A body, the integral parts of which are perpetually shifting and changing, as death, election, and individual choice may direct to-day a part, to-morrow none, has no enduring intrinsic individuality. Such a body is the General Assembly spoken of in this lease, and the property therefore could not belong to it. The General Assembly can no more hold title to real estate than could "the National Republican Convention." Neither can *it* sue or be sued, *eo nomine;* nor can the *individuals* in this ecclesiastical voluntary association; for the individuals are not constant. But suppose a convention, or a General Assembly, having a common purpose, require the use of property to further that purpose, and they designate a number

4 Wharton 555 598

of individaals as a committee, place funds in their hands, and direct them to purchase property and to manage and control it for the benefit of the assembly or convention, and the persons so designated do purchase real estate, taking the legal title in their own names, and then lease the property. What would be more natural, or legally more idle, than that in their desire to manifest their fiduciary relations with the convention or assembly, they should inject somewhere in the instrument, as a *descriptio personarum*, the statement that they were acting as a committee appointed by the convention, that is, under its authority and for its benefit? Is this description or statement at variance at all with the fact that legally the title is in their name; that legally they act as principals binding themselves individually by their covenants to refund rents in a given contingency, and binding the lessee to themselves individually for the payment of these rents.

Again, can it be supposed that Rutherford looked to the responsibility of an unincorporated, intangible, and vague association, having no legal existence, no local habitation, but only a name, for the repayment of his money? (Fol. 23.) Was it not rather relying upon the responsibility of his well known fellow citizens, his lessors, in possession of the property, from whom he obtained the possession, to whom he agreed to return it, that he entered into all the covenants of this lease?

The learned justice who delivered the opinion of the court below, admits (fol. 90) that unless this instrument necessarily discloses that these parties were merely the agents of a principal who is stated, the tenant would be estopped. In other words, no matter where the title actually was, the question before the court is, pure and simple, what is the legal construction of the lease? Judging from the lease, did these parties contract merely as agents? and the abstract rule enunciated by the court was, if they contracted only as agents, they were not bound by the covenants personally, but are estopped from enforcing the covenants against the lessee though he has enjoyed the full benefits of the demise.

There is nothing either in the lease or the evidence to show these lessors did not hold the legal title of the property as joint partners.

The court below held the tenants estopped, and refused to allow us to go into proof of title.

We claim, however, that even in that case, if the lease discloses an irresponsible principal, with whom the lessee could not covenant, the covenants of the lease were properly executed by the plaintiffs under their own hands and seals, bound them individually, and reciprocally bound the lessee.

*Vid.* Citations, Record, pp. 26, 27.
Story on Agency, §§ 280, 281, 282–285.
Hills *v.* Bannister, 8 Cow., 32.
Norton *v.* Herron, 1 Carr. & P., 638.
Taft *v.* Brewster, 9 J., 334.
Tippets *v.* Walker, 4 Mass., 595.

The rule in Combe's case, (9 Coke, 75*a*,) does not apply unless it appears from the lease that those who made the lease were acting as attorney or agent for a principal who has recognized legal status and responsibility under a power to act *vice et nomine suo*, and that they do not in executing the instrument act, in accordance with the terms of that power.

The case at bar discloses no responsible principal, nor any authority to act, limited in its character.

For further illustration of principles involved in the case, see

Townsend *v.* Goewey, 19 Wend., 425.
Davis *v.* Garr, 6 N. Y., 124, 134.
Green *v.* Cady, 9 Wend., 414.

WM. A. MELOY,
*Counsel for Plaintiff in Error.*

# Supreme Court of the United States.

CHARLES STOTT, ET AL.
vs.
WM. RUTHERFORD.
No. 123.

STATEMENT AND BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

This was an action brought upon the covenants of a lease of real estate in Washington, of which profert was made in the declaration, made by certain P. D. Gurley and others, "*acting as a church extension committee, by authority and on behalf of the General Assembly of the Presbyterian Church, old school,*" to the defendant in error. The lease was signed and sealed by the committee in their own names, and the suit was also brought in their names. (Record, p. 5.)

A verdict was rendered for the plaintiffs, and the defendant gave notice of a motion for a new trial, and a motion in arrest of judgment.

The Court, in General Term, without disposing of other questions, held the declaration bad on its face, on the ground

that the lease was void, not being the deed of the principal, and conveying no title to the lessee, as a consideration for his covenants.

The Court therefore directed a judgment to be entered for the defendant, *non obstante verdicto*. It was in substance, an arrest of the judgment.

The only question, then, presented on the record, relates to the validity of the lease.

The lease states exactly in what character the lessees act, not in their own behalf or right, but "*acting as a committee*," "*by authority and on behalf of*" other parties. They only profess to act as agents on behalf of others, as principals. Yet they execute the lease as their own deed.

According to well settled principles of law, it is not the deed of their principals, and consequently does not pass the title of their principals. And if no title passes by the lease, the covenants on the part of the lessee are not binding on him.

See Story on Agency, sec. 148, and cases.

Bacon's Abridgment Leases, I, 10, speaking of leases executed by an attorney in his own name, says: "And therefore, all such leases made in that manner, seem to be absolutely void, and not good, even by estoppel, against the attorney, because they pretend to be made not in their own name absolutely, but in the name of another, by virtue of an authority which is not pursued."

So in an anonymous case, Moore, pl. 191; the King's surveyor, having authority to make leases, made a lease in the King's name, but affixed his own seal, and the Court held these leases to be void, because not made pursuant to authority.

So, in Frontin v. Small, 2 Ld. Raymond, p. 1418, the facts were that the plaintiff, Martha Frontin, as *attorney of James Frontin*, demised to the defendant, by lease under the plaintiff's seal, a house, and the defendant covenanted to pay rent to James Frontin, on which covenant this suit was brought. The Court held that upon the face of the declaration the lease was void, and that there was no estoppel, it appearing in the lease that the plaintiff only made it as attorney, and that consequently the covenant to pay rent was void.

In the report of the same case in 1 Strange, 705, it was argued that the word "*demisit*" imported a covenant by the plaintiff, but the Court answered, that this was only in a good lease and not in one that was void. Therefore, the defendant received nothing as a consideration for his covenants.

So in Bogart v. DeBussy, 6 Johns, 94. Two persons made a contract under seal, as attorneys of a third, to convey real estate, and afterwards sued on the contract. It was held void on the authority of the aforegoing cases.

In Spencer v. Field, 10 Wend. 87, which was a contract between the agents of the State and a private person, the distinction was taken between a contract that the principal should convey his property and a contract that the agent should convey the principal's property. The latter was held void because impossible.

So, in the present case, the agent actually attempts to convey the principal's property, and the conveyance is void.

It is undoubtedly true that an agent executing a covenant in his own name, may become personally liable, and when that is the case, it may be a consideration for cove-

nant on the other side. But here is no case of executory covenants on the part of the lessors. There is simply an attempt by parties describing themselves as agents and professing to act as such, to transfer a title of their principals. There is no express covenant, and, according to the case in Strange, there is no implied covenant in such a case, the lease being void on its face.

This distinguishes the case from those referred to in the minority opinion of the Court below, which were cases of executory agreements, in which the agent unnecessarily bound himself to do something in the future.

COX & HINE,

*Of Counsel for Defendant in Error.*